United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

ORIGINAL

75-4052

To be argued by
ELLIOTT C. WINOGRAD

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P/S

In The

United States Court of Appeals

For The Second Circuit

TNT TARIFF AGENTS, INC. and NATIONAL CARLOADING CORPORATION,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review from Order of the Interstate Commerce Commission

REPLY BRIEF FOR PETITIONERS

ELLIOTT C. WINOGRAD
Attorney for Petitioners
201 Eleventh Avenue
New York, New York 10001
(212) 924-2220

(8496) LUTZ APPELLATE PRINTERS, INC.
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3

TABLE OF CONTENTS

TABLE OF CITATIONS

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REPLY BRIEF OF PETITIONERS

REPLY POINT I

IN RESPONSE TO ICC, EASTERN AND RMB DISTINCTIONS OF ALLOWANCES AND DOCK RATES.

The briefs of Intervenors, RMB and Eastern and the brief of Respondent, ICC, fail to distinguish the complex,intricate and real distinctions and differences between dock rates and allowances. For example, RMB analysis of the tariff publication (Tariff West) fails to deal with these essential distinctions between dock rates and allowances, and then concluded that "a rose by any other name is still a rose". TNT respectfully contends and humbly argues that dock rates are in fact a "horse of a different color". Begging the Court's indulgence, although "a rose by any other name is still a rose", ..., "a horse of a different color is still a horse of a different color".

RMB contention (RMB Br.5) that the publication of dock rate involves an allowance is untenable. RMB quotation from Freight Forwarders Allowance at Baltimore, Md., 315 ICC 719, 721, is out of context in a situation where ABC Freight Forwarding Corp. specifically called the rate adjustment an "allowance".

RMB reference to Lehigh Valley R. Co., v. United

States, 243 U.S. 444, (1917), is totally irrelevant. The five thousand ($5000.00) dollars annual salary received by the shipper in that case obviously involved an illegal rebate. The case before this Court does not involve a rebate of any kind, nature or description. TNT is dealing with published rates. Therefore, if a shipper delivers the shipment to the docks, the shipper will pay a certain rate. TNT does not and will not vary from these published rates and there is no evidence presented that it will.

TNT wholeheartedly agrees with RMB contention (RMB Br.6) that an allowance can be no more than just and reasonable. However, to reiterate, this is totally irrelevant because we are not dealing with an allowance in this case but we are dealing,in fact, with dock rates.

Petitioner is pleased to note that RMB, Eastern and ICC accepts and admits TNT contention that the publication of dock rates (not allowances) is legally effective until proved otherwise and the burden of proof is on the protestants and ICC.

In Eastern discussion of dock rates vis-a-vis allowances, Eastern suggests that TNT is trying to set up some "arcane standard" rather than the normal standards of

allowances (Eastern Br. 17). Petitioner is not attempting to create a new standard. On the contrary, TNT has met the standard for published dock rates.

Petitioner in response to the attack on the sufficiency of economic data (Eastern Br. 17) (ICC Br. 30) calls this Court's attention to Missouri K & T Ry. Co. v. Public Utilities Commission, 172 P. 1022, 1024:

> But the courts have recognized that this sort of evidence is seldom if ever available; and that until railroads and shipper, or legislators and commissions and courts, or all of them together, can settle and agree upon some arbitrary factor to be included as the proper proportionate burden of investment, maintenance, administration, taxation, wages, services, etc., which commodity hauled by a railroad should bear, the evidence which appellant says was wanting in this case will be wanting in every case; and, if the failure to produce that particular line of evidence is fatal to the carrier's it would always be useless to seek judicial redress. A freight rate law suit is in most respects like any other law suit. It has to be decided on the evidence which the parties can and do present and justice cannot be withheld because of rate complained of cannot be shown with the precision of a mathematical theorem to be noncompensatory.

Petitioner once again calls this Court's attention to the fact that Mr. Craig Rocky's statement is the only evidence before the Commission which pertains specifically to Freight Forwarders costs. In addition, Petitioner humbly maintains that it should be clear to all parties that there is in fact a tremendous, significant and urgent difference between the cost and rate structure to motor carriers and freight forwarders.

Eastern (Eastern Br. 18) once again reveals its inability to see clearly the issues before this Court. TNT was not attempting to save a "half-a-loaf" by noting that no other motor carriers have protested the published rates; rather the Petitioner was clearly setting forth proof that its published doc rates could not have been unreasonable in light of the fact that other motor carriers were silent and did not protest.

Eastern, ICC and RMB claim (Eastern Br. 20) (ICC Br. 28) (RMB Br. 12) that Mr. Craig Rocky's verified statement (JA351a) supports their contention that there are no physical differences between the equipment, facilities, and other operational characteristics of the pick-up services of motor carriers and freight forwarders. This

contention is erroneous and misleading to this Court. Instead of taking up this Court's time in quoting the remarks of Mr. Craig Rocky at length, TNT respectfully refers this Court to same.

In discussing the difference between dock rates and allowances, the brief for ICC maintains that Central Territory Motor Carriers Rate, 31 MCC 273, (1941), stands for the proposition that it is immaterial whether the full rate is paid and a portion of that amount returned to the shipper, or if a reduced rate is paid in the first instance. Petitioner refers this Court to Central, supra, wherein it states, "it is contended that the method of making the allowances is immaterial ... we see little merit in this contention". Central, supra, p. 279, ICC fails to substantiate its contention that such consideration relates only to procedures by which the allowance (dock rates) is implemented and does not bear upon the substantive consideration of whether or not the amount of the dock rate is just and reasonable.

REPLY POINT II

RMB, ICC AND EASTERN FALLACIES AS TO RATE STRUCTURE.

Intervenor, RMB, maintains that a flat rate reduction cannot be cost related (RMB Br. 9). RMB states that LTL shipments of five thousand (5000) lbs. cost less to pick-up than shipments of forty thousand (40,000) lbs. However, RMB conveniently neglects to indicate what the cost would be for the lesser weight shipments. TNT costs, however, are not less per cwt. on a shipment of five thousand (5000) lbs. than on a shipment of one thousand (1000) lbs. The vast majority of TNT cartage contracts (409 contracts) do not provide a grasshopper scale based on weighted shipments. TNT pays the cartage agent the same money per cwt. if picking up five thousand (5000) lbs. or picking up one thousand (1000) lbs. Of course, in many instances, TNT does utilize its own equipment and the per cwt. costs could well be slightly lower on higher weighted shipments. However, TNT adjusts its dock rates accordingly and has to of necessity deal with averages in constructing the one dollar ($1.00) off dock rates.

The cost reductions involved in the rates published are based on a cost related average. It is not possible to

tabulate the actual cost for each conceivable shipment from every present and potential shipper, each with tens of thousands of different pick-up locations.

With respect to paying allowances for transportation to docks by shippers outside the terminal area, (RMB, Br. 11), this is exactly the point Petitioner is trying to make and this is exactly the point that Intervenors and Respondents fail to grasp and understand. The rate is open to all shippers who bring freight to the dock, regardless of whether the cargo "comes from down the block or from one hundred (100) miles away.

Pick-up and delivery costs are not only those that occur in the commercial zone as Intervenors and Respondents would have this Court believe. Shipments can be to or from a point outside of the commercial zone, which would require the freight forwarder to rely on a cartage agent, thus, incurring additional costs (Eastern Br. 28) (ICC Br. 26).

With reference to RMB remarks, (RMB Br. 12), we know that RMB has not presented prima facie evidence with the differential involved in published rates of Petitioner which would exceed the costs of freight forwarders, but rather the

costs to motor carriers. This failure to differentiate between motor carriers and freight forwarders is prevelant throughout the briefs of Respondents and Intervenors alike (ICC Br. 22). (This court is respectfully referred to Petitioners brief pages 51 - 55.).

In connection with RMB's remarks (RMB Br. 14) that presently effective allowances in lieu of pick-up provide only 5¢ or 10¢, it should be noted that these paper rates have not been charged in several years and that RMB admitted that its costs were 33% higher. Therefore, it defies logic that motor carrier costs should be so low and one can speculate that motor carriers, in fact, discourage the shipping public from bringing cargo to the motor carrier docks.

Eastern attempts to make the point that TNT's assailed rates became legally effective, thus shifting the burden of going forward with substantial proof to the protestants, by "slipping" the rates through unnoticed and unprotested. (Eastern Br. 24). Eastern references here is to the symbols (Eastern Br. 4) (ICC Br. 18) used in the publications of the tariff. However, this point it without merit. Interstate Commerce Commission Regulation, Section 1304.2 indicates that "all tariff publications or supplements

thereto must indicate increases, thereby made in existing rates or charges, rules or regulations, or classification by the use of black-faced type or by the use of a uniform symbol throughout the schedule". Also, the courts attention is directed to International Paper Co. v. Delaware & H.R. Corporation, 73F. Supp. 30,35:

> In arriving at this conclusion, the Court agrees with the defendant that the alleged change in this tariff made December 30,1933, bearing a symbol allowable only for increases of rates has no probative force whatever and is not considered in this Court in its decision. This alleged change is not in the nature of an admission for an admission is something voluntarily said or done. Whereas here, the present change that the alleged admission is compelled to use the symbol in question by the requirements of public policy, whether he will or not, it loses its character as a voluntary act and, therefore, loses any force it might otherwise have as an admission.

In the case of Burris Mill & Elevator Co. v. Chicago R.I. & Pr. Co., 131 F. 2nd, 532, 534, the Court said, "the construction of tariffs does not substantially differ in character from that of any other document drawn in controversy (citations omitted) and one cardinal rule of con-

struction is that all pertinent parts and provisions shall be taken into consideration and each given the effect if that can be reasonably done". In construing the tariff in question, persuasive evidence can be found in the fact that the title pages clearly stated that "this supplement contains changes resulting in reductions" (JA 387a).

Eastern contention (Eastern Br. 25) that because TNT failed to offer one "scintilla" of evidence to show that the areas served by Eastern were not representative of the entire Tariff East area, estopped TNT from challenging the ICC's holding that the allowance (dock rates) was unreasonable for every locality, it untenable. Such evidence was not brought forth by TNT because it seems clear that if the rates were confiscatory in other areas, other carriers would have indeed protested same.

REPLY POINT III

THERE IS NO QUESTION THAT THE INTERSTATE COMMERCE COMMISSION ACTED ARBITRARILY, CAPRICIOUSLY AND WANTONLY IN BOTH TARIFF EAST AND TARIFF WEST

All parties have failed to establish a prima facie case that is required to shift the burden of proof to the Petitioner. As previously stated, the evidence presented by the Respondents and Intervenors was probative only of motor carriers and not freight forwarders. The Administrative Law Judges in both cases (Tariff East and Tariff West) acted arbitrarily, capriciously and wantonly as to matters of law. For beyond the requirements that the Commission's holding must be supported by "substantial evidence", is the fact that this is not just a question of who the Administrative Law Judges believed, but of what the law is. It is worthy to note that the motor carriers rates are so low as to be confiscatory, whereas the freight forwarders rates represent a reasonable allowance for costs incurred.

Eastern brief (Eastern Br. 35) quite clearly states that as to matters of a mistake of law the Commission's findings are not final. Petitioners petition for rehearing was based on the fact that the Commission and the protestants

did not meet the burden of proof (prima facie), rather than on the grounds of newly discovered evidence (Eastern Br. 28). Even if the petition for rehearing was not seen in that light, the Commission's ruling did not indicate that it had rejected Mr. Craig Rocky's statement on the theory that it was new evidence. Therefore, the Commission must have reconsidered the entire record and arbitrarily and capriciously ruled against a rehearing.

CONCLUSION

The conclusion is inescapable that the subject orders of ICC now before this Court for review are arbitrary, capricious, erroreous in fact and in law, and unsupported by substantial evidence, and should, therefore, be rescinded.

Respectfully submitted,

Elliott C. Winograd
Attorney for Petitioners

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TNT TARIFF AGENTS, INC, et ano.,

Petitioners,

- against -

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Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at*

1235 Plane Street, Union, N.J. 07083

That on the 29th *day of* August 1975 *, deponent served the annexed*

Reply Brief

upon 1) Fritz Kahn & John Osborne *attorney(s) for*
2) John H.D. Wiggen & Thomas E. Karper

in this action, at 1) 12 & Constitution Ave. N.W., Washington D.C.
2) Department of Justice, Washington D.C.

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* of *same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 29th
day of August 19 75.

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977